(5)

No. 03-1423

IN THE

Supreme Court of the United States

DARIN L. MUEHLER AND ROBERT BRILL,
Petitioners,

v.

IRIS MENA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONERS

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May 24, 2004

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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REPLY BRIEF OF PETITIONERS

As petitioners have demonstrated, this case presents two recurring constitutional questions that are ripe for this court's review: whether the questioning of a lawfully detained individual can violate the Fourth Amendment; and whether the "unusual case" exception to *Michigan* v. *Summers*, 452 U.S. 692 (1981), extends to the detention of occupants in handcuffs during the execution of a search warrant for weapons. Unable to refute that showing, respondent resorts to fundamental mischaracterizations of the factual bases and actual legal holdings of the Ninth Circuit's decision in this case. These revisionist efforts, however, cannot obscure the clear conflicts that the decision below creates or further deepens on each of the questions presented by the petition.

1. Respondent does not, and indeed cannot, deny that there is a clear and irreconcilable split of authority among the courts of appeal on whether questions asked of lawfully detained individuals can constitute an additional, unreasonable seizure under the Fourth Amendment. See Pet. 10-12 (identifying circuit court cases). Instead, she argues only that this case is an "inappropriate vehicle" for review of the undisputed conflict, claiming that the Ninth Circuit's resolution of this issue was dictum, that the Ninth Circuit only treated questioning as a "factor" affecting the reasonableness of the detention, and that this case is factually different from the multiple other circuit court decisions on this issue. Opp. 20-24. These claims are completely baseless.

The Ninth Circuit's conclusion that petitioners violated respondent's Fourth Amendment rights by questioning her about her immigration status was an independent alternative *holding*—not dictum. After the court concluded that detaining Mena for several hours in handcuffs was a violation of the Fourth Amendment, it went on to hold that the questioning "*alone*" was "a violation of a constitutional

right." Pet. App. 10a (emphasis added). Later the court reaffirmed that questioning Mena was an independent Fourth Amendment violation. See *id.* at 14a ("*[J]ust on these facts alone*, . . . Mena alleges a Fourth Amendment violation") (emphasis added). Indeed, the court gave "particular emphasis" to its holding that the questioning violated the Fourth Amendment. *Id.* at 10a.[1]

Alternative holdings are not dicta. "[W]here a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*." *Woods* v. *Interstate Realty Co.*, 337 U.S. 535, 537 (1949); see also *Richmond Screw Anchor Co.* v. *United States*, 275 U.S. 331, 340 (1928) ("It does not make a reason given for a conclusion in a case *obiter dictum* that it is only one of two reasons given for the same conclusion."). The holding that the questioning violated the Fourth Amendment was "an independent, alternative basis for the decision of the court below, no more dicta than its companion holding." *United States Steel Corp.* v. *United States EPA*, 444 U.S. 1035, 1038 (1980) (Rehnquist, J., dissenting from denial of cert.). The alternative holding on questioning is binding precedent throughout the nine states

[1] Respondent's argument that the Ninth Circuit's decision on this issue was based in part upon the allegedly illegal search of respondent's purse is a red herring. Although the court noted in passing that the search of respondent's purse required reasonable suspicion, *see* Pet. App. 14a, its holding was "that the officers unduly invaded Mena's privacy by inquiring unnecessarily into her citizenship status," *id.* at 10a, as the other judges on the en banc panel clearly understood. *See id.* at 25a-26a (Kleinfeld, J. dissenting) (describing the holding as "the extraordinary new proposition of law that it is unconstitutional to ask a person detained for other reasons about her citizenship, without reasonable suspicion"); *id.* at 33a (Gould, J., dissenting) (objecting to the panel's holding "that the Constitution is offended by police officers asking Ms. Mena a question about her citizenship"). Moreover, the officers were plainly authorized by the search warrant to search respondent's purse; the purse was on the premises, and among the items targeted by the search warrant were "[i]tems of personal property tending to establish the identity of person(s) in control of said premises." *See* Appellant's Excerpts of R. 255.

encompassed by the Ninth Circuit. See *Best Life Assurance Co.* v. *Commissioner*, 281 F.3d 828, 833-34 (9th Cir. 2002) (alternative holdings are binding precedent). As such, it is plainly appropriate for this Court's review.[2]

Nor is there the slightest merit to respondent's revisionist claims that the Ninth Circuit simply deemed respondent's questioning one of "many factors that rendered her detention unreasonable," and that it did not hold that questioning alone constituted a separate Fourth Amendment violation. Opp. 21-22. In fact, the Ninth Circuit held with "particular emphasis" that the questioning "alone" was a violation of the Fourth Amendment. Pet. App. 10a. The multifactor analysis that respondent posits simply does not appear in the Ninth Circuit's decision.

Finally, the fact that there are many different situations in which lawfully detained individuals have been questioned, Opp. 23, is a factor that *favors*, rather than militates against, review of this issue. Because it arises in contexts as divergent as traffic stops, immigration inspections, and *Summers* detentions, the issue of whether lawfully detained persons can be asked questions that are not founded upon probable cause or reasonable suspicion is a significant and recurring constitutional question with profound implications for a wide range of police activities. Contrary to respondent's claim, however, this fundamental legal question is not one that "turns on the facts and circumstances unique to each of these settings," Opp. 24; whether law enforcement officers are as free to ask questions of lawfully detained individuals as they are to ask questions of individuals on the street is a pure

[2] The fact that the Ninth Circuit panel reached out to decide an issue that had not been fully addressed by the parties, Opp. 22, in no way undermines this conclusion. This Court reviews "'issue[s] not pressed so long as [they have] been passed upon.'" *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). The Ninth Circuit undoubtedly "passed upon" the issue of whether the questioning of a lawfully detained individual can violate the Fourth Amendment.

question of constitutional law. Cf. *Florida* v. *Bostick*, 501 U.S. 429, 434 (1991); *INS* v. *Delgado*, 466 U.S. 210, 218 (1984). Seven federal circuits have now ruled on this recurring legal issue. See, *e.g.*, *United States* v. *Chacon*, 330 F.3d 323, 328-29 (5th Cir. 2003); *Martinez-Camargo* v. *INS*, 282 F.3d 487, 493 (7th Cir. 2002); *United States* v. *Childs*, 277 F.3d 947, 949-50 (7th Cir.) (en banc), *cert. denied*, 537 U.S. 829 (2002); *United States* v. *Holt*, 264 F.3d 1215, 1229 (10th Cir. 2001) (en banc) (per curiam); *United States* v. *Pruitt*, 174 F.3d 1215, 1221 (11th Cir. 1999); *United States* v. *Jacobs*, 173 F.3d 426 (4th Cir. 1999) (table) (per curiam), *available at* 1999 WL 96121, at *2; *United States* v. *Ramos*, 42 F.3d 1160, 1163 (8th Cir. 1994). The Fourth, Fifth, and Seventh Circuits have ruled that questions alone cannot violate the Fourth Amendment; the Eighth, Ninth, Tenth, and Eleventh Circuits have held that they can. It is time for this Court to settle this conflict by granting the petition for certiorari.

2. This case also presents the opportunity for this Court to reconcile the courts of appeals' divergent interpretations of the scope of the "unusual case" exception to *Michigan* v. *Summers*, 452 U.S. 692 (1981). Respondents attempt to obscure the Ninth Circuit's clear break with the interpretations of other courts by exaggerating and, in some instances, completely misstating the factual basis of the Ninth Circuit's conclusion that this was an "unusual case." A review of the facts that the Ninth Circuit actually relied upon to support that conclusion, however, illustrates both the nature of respondent's distortions and, more importantly, the degree to which the Ninth Circuit's drastic expansion of the "unusual case" exception differs from the interpretations of other courts and from the spirit of *Summers*.

The Ninth Circuit clearly identified the facts that, in its view, rendered Mena's detention constitutionally unreasonable: "pointing a machine gun at Mena's face, roughly jerking her off of her bed, marching her barefoot through the rain into a cold garage, and keeping her in handcuffs for several hours." Pet. App. 9a-10a. The additional "facts" posited by respondent appear nowhere in the Ninth Circuit's opinion or in the record itself. The court never found that Mena's handcuffs were "overly tight," as respondent claims throughout her opposition.[3] Opp. 15, 19; see *id.* at 13 & n.4. The court also never suggested that Mena was handcuffed for any period of time after the search concluded. See *id.* at 7, 8, 13, 15, 17, 18.

Instead, in concluding that respondent's detention violated the Fourth Amendment, the Ninth Circuit repeatedly stressed that she was handcuffed at gunpoint and held in handcuffs for two to three hours. See Pet. App. 3a (officers, "pointing a submachine gun at her head, turned [Mena] onto her stomach and handcuffed her"); *id.* ("Although she was absolutely compliant, the officers detained Mena in handcuffs for two to three hours"); *id.* at 9a ("the officers handcuffed Mena and kept her in handcuffs for two to three hours"); *id.* (officers "us[ed] handcuffs for an extended period"); *id.* at 10a (officers "ke[pt] her in handcuffs for several hours"). These are the central facts that governed the lower court's constitutional analysis, and that will govern future determinations throughout the Ninth Circuit. It was these facts that prompted Judge Kleinfeld in his dissent from the denial of rehearing en banc to opine: "[i]f the footnote in *Summers* can be extended to this case, the holding of *Summers* is deprived of any force." *Id.* at 32a. Accordingly, even if the additional facts respondent cites place the detention in this case "close" to the constitutional line (*id.* at 33a (Gould, J., dissenting)), that would only make this case a better vehicle for deciding the scope of *Summers*. It would not provide a reason to deny the petition.

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[3] Although she testified that being handcuffed was "uncomfortable," respondent never claimed that the handcuffs were too tight and in fact testified that she did not remember asking the officers to loosen them. *See* Appellant's Excerpts of R. 119, 163.

The Ninth Circuit's determination that the "unusual case" exception to *Summers* applies when the occupant of lawfully searched premises is handcuffed at gunpoint and remains in handcuffs for the duration of a two to three hour search is diametrically opposed to the Third, Sixth, and Tenth Circuits' interpretation of the "unusual case" exception. See *Wright* v. *City of St. Francis, Kan.*, No. 02-3337, 2004 WL 838181, at *7-*8 (10th Cir. Apr. 20, 2004); *Pikel* v. *Garrett*, 55 Fed. Appx. 29, 32 (3d Cir. 2002); *United States* v. *Fountain*, 2 F.3d 656, 661-63 (6th Cir. 1993). The *Wright*, *Pikel*, and *Fountain* courts each recognized that handcuffing occupants during the execution of a search warrant in potentially dangerous circumstances is not an "unusual case" under *Summers*.

In *Wright*, a case decided by the Tenth Circuit after the filing of the petition in this case, state tax agents investigating misdemeanor tax violations handcuffed the occupants of a residence for four hours during the execution of a search warrant. 2004 WL 838181, at *2. As in the present case, the tax agents held the occupants at gunpoint while handcuffing them and kept them in handcuffs for the duration of the search. See *id.* As justification for the search, the tax agents claimed that they had been warned that occupants had a history of violence and possessed firearms; however, during the search the agents found no firearms save a broken BB gun. See *id.* at *2, *8. Nevertheless, in light of the warning the agents had received before executing the warrant, the Tenth Circuit held that the agents acted reasonably by using handcuffs to detain occupants for the duration of the search. See *id.* at *8.

The Tenth Circuit's refusal to apply the "unusual case" exception to *Wright* embodies a vastly different understanding of that exception than the one adopted by the Ninth Circuit in this case. The plaintiffs in *Wright* were detained in handcuffs for four hours, much longer than the detention in this case. See *id.* at *2. Moreover, the attempted

murder charges that were being investigated here are far more serious than the misdemeanor tax violations that were being investigated in *Wright*, and thus the risk petitioners faced that occupants might flee, resist the search violently, or destroy evidence was far more serious. See *Summers*, 452 U.S. at 705.

Similarly, in *Pikel* the Third Circuit held that officers acted reasonably when they handcuffed employees of an automobile body shop for three and a half hours during the execution of a search warrant. 55 Fed. Appx. at 32. The detention was more intrusive than that in the present case.[4] Not only was the *Pikel* detention longer than the detention of respondent by as much as an hour and a half, it was also in a public workplace rather than in a private home. See *id.* Nevertheless, the Third Circuit recognized that the "unusual case" exception should not apply. *Id.*; see also *Fountain*, 2 F.3d at 663 (holding that handcuffing occupants and forcing them to lie face down on the floor was reasonable).[5]

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[4] Respondent's assertion that the officers in *Pikel* faced a risk of harm greater than that confronted by petitioners is without merit. Petitioners were searching for a firearm used in an attempted murder. They were in the residence of a gang member who had been implicated in at least two shootings. *See* Pet. 3-4; Appellant's Excerpts of R. 259-60. During the course of their search the officers found a gun and several baseball bats with the gang's insignia. *See* Pet. 6; Appellant's Excerpts of R. 95-96. The fact that one of the employees in *Pikel* was carrying a gun does not distinguish *Pikel*; the officers handcuffed all the employees, not only the one with a gun.

[5] Respondent's claim that the detention in *Fountain* was justified because firearms and drugs were found during the search puts the cart before the horse. The question is whether officers had reason to place occupants in handcuffs based on the information available at the time. When petitioners executed the search warrant, they knew that they were searching for a weapon used in a driveby shooting at a location that was a possible gang safe-house. Under those circumstances, handcuffing the multiple occupants during the duration of the search was more than reasonable.

The Ninth Circuit has expanded the "unusual case" exception of *Summers* far beyond the interpretations of these three circuits. Indeed, another Ninth Circuit panel has recognized that at the time respondent was detained "it was not clearly established in this (or any other) circuit that simply handcuffing a person and detaining her in handcuffs during a search for evidence would violate her Fourth Amendment rights." *Meredith* v. *Erath*, 342 F.3d 1057, 1063 (9th Cir. 2003). Moreover, the Ninth Circuit's decision significantly impedes the ability of law enforcement officers to execute search warrants safely. Depriving officers of authority to secure all occupants at a location where the officers reasonably expect to find guns and violent gang members exposes officers needlessly to danger. See Brief of *Amicus Curiae* Police Officers Research Association of California Legal Defense Fund and Affiliates in Support of Petition for Writ of Certiorari 10-11; Brief of *Amicus Curiae* League of California Cities Supporting Grant of Certiorari 2. This Court should resolve the conflict between the Ninth Circuit and the Third, Sixth, and Tenth Circuits and should grant the petition for certiorari.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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